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No. 592.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

A. A. SPRAGUE, Receiver for Chicago North Shore and Milwaukee Railroad Company, Petitioner,

vs.

J. ALBERT WOLL, United States Attorney for the Northern District of Illinois, Respondent,

and

INTERSTATE COMMERCE COMMISSION, DIVISION 900 OF THE AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA et al., Interveners-Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF

For Intervener-Respondent, Division 900 of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America.

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OPINIONS BELOW.

Opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 574).

Opinion of the District Court of the United States for the Northern District of Illinois, Eastern Division (R. 544).

Report of the Interstate Commerce Commission (R. 523).

JURISDICTION.

July 22, 1941, decree of the Circuit Court of Appeals entered (R. 580).

August 18, 1941, appeal filed (R. 581).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Did the Circuit Court of Appeals err in upholding—

(a) The determination of the Interstate Commerce Commission that the North Shore was a part of a street railway system of distribution and subject to the provisions of the act;

(b) That the Commission had power to reopen a proceeding theretofore decided by it and reverse its earlier decision?

STATUTES INVOLVED.

Railroad Retirement Act of 1937:

Section 1, * * *

"(a) * * * Provided, However, that the term 'employer' shall not include any street, interurban, or suburban electric railway unless such railway is operating as a part of a general steam railroad system of transportation, but shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any other motive power."

Like provision in Carrier's Taxing Act of 1937 and Section 1, first paragraph of the Railway Labor Act, as amended 1934.

CHRONOLOGY OF PROCEEDINGS.

A.

THE PROCEEDINGS PRIOR TO NOVEMBER 6, 1937.

January 9, 1933. In **United States of America v. Chicago North Shore & Milwaukee Railroad Company**, 288 U. S. 1, 77 L. Ed. 583, an action to enjoin the Railroad Company, pursuant to paragraph 12, subdivision (1), of the Interstate Commerce Act as amended, as required by section 20 (a) of the act, adopted February 28, 1920, the Court held it to be an interurban, on the issue before it.

As we will show later, the decision in that case has no application to the present issue.

November 7, 1936. In a proceeding, **without contest**, objections or exceptions, before a division of the Interstate Commerce Commission, instituted at the request of the National Mediation Board, known as Case—Railway Labor Act, Docket No. 7, it held that the Chicago North Shore and Milwaukee Railroad Company fell within the terms of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934.

B.

THE PROCEEDINGS UPON WHICH THIS ISSUE WAS HEARD BEFORE I. C. C.

November 6, 1937. Division 900 of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America filed complaint to determine their status under the Railroad Retirement Act of 1937, as employees of the Chicago North Shore and Milwaukee Railroad Company.

Special attention is called to paragraph VI of this intervener-respondent's complaint (R. 178).[1]

The proceeding is designated as Railroad Retirement Act, Electric Railway Docket No. 2.

January 29, 1938. The Receiver filed a motion to discontinue the proceeding.

Special attention is called to paragraph V of the answer to Receiver's motion to dismiss[2] (R. 192).

The Receiver's answer took no issue therewith.

February 25, 1938. Motion denied.

February 25, 1938. The Interstate Commerce Commission, Division No. 3, made its order[3] (R. 195).

April 18, 1938. Receiver made answer to the complaint in Electric Railway Docket No. 2.

October 27, 1938. The Examiner, the Honorable E. M. Steer, after hearing filed his report, wherein he found that the Chicago North Shore and Milwaukee Railroad Company did not fall within the terms of the exemption proviso in the first paragraph of Section 1 of the Railway

1 "* * * (2) The complaint, however, expressly omits from the foregoing offer any and all proof then submitted that organized labor has no opposition of record to the contention of the employer then made that the Railroad 'falls within the terms of the exemption proviso in the first paragraph of Section 1 of the Railroad Labor Act as amended June 21st, 1934.'"

2 "That the appearance was made for complainant in Docket No. 7 as an intervening party without its lawful authority. That the adjudication in that case in nowise directly affected its benefits and rights under the Railroad Retirement Act of 1937; that the defendant being then and there solely interested, and those appearing for the complainant in maintaining the status quo of the financial structure of the defendant railroad company and not otherwise; that the said Railroad Retirement Act of 1937 was enacted into law subsequent to the decision made in Docket No. 7."

3 "It Is Ordered, That Railway Labor Act Docket No. 7 be, and it is hereby, reopened by the division upon its own motion for further hearing in connection with the complaint in Electric Railway Docket No. 2 so that the status of the above named carrier, its receiver, and the employees may be considered and determined in the same proceedings and on the same record under the Railway Labor Act, the Railroad Retirement Act of 1937, and the Carriers' Taxing Act of 1937."

Labor Act as amended June 21, 1934, nor the corresponding proviso in Section 1 (a) of the Railroad Retirement Act of 1937, and the Carriers Taxing Act of 1937.

July 11, 1939. After an oral argument before the entire Interstate Commerce Commission, the Commission made its report in which it affirmed the report of the Examiner.

C.

THE PROCEEDINGS IN THE DISTRICT COURT AS THEY PERTAIN TO THIS INTERVENER-RESPONDENT, DIVISION 900.

August 9, 1939. Receiver filed petitions: for authority to continue to refrain from complying with provisions of Railroad Retirement Act of 1937 and Carriers Taxing Act of 1937, and for injunction restraining the United States District Attorney from prosecuting appellant for alleged violations of the Railway Labor Act (R. 2).

October 30, 1939. Order made permitting Division 900, etc., to intervene (R. 71).

November 18, 1940. Memorandum opinion by the District Judge (R. 544).

January 7, 1941. Findings of fact and conclusions of law (R. 548).

ARGUMENT.

A.

THE FINDING THAT THE NORTH SHORE[1] IS NOT WITHIN THE EXEMPTION PROVISO HAS SUPPORT IN EVIDENCE.

Throughout the record, for comparative analysis, eleven electric railroads[2] ruled to be more than interurban under the Railroad Labor Act as amended are considered.

The evidence in this case is best summarized in complainant's exhibits printed in the transcript of the record, pages 404 to 415, both inclusive, and by charts I and II (see appendix to this brief). Their inspection will in succinct, tabulated and graphic form bring to this Court the conclusiveness and correctness of the findings.

THE NORTH SHORE.

Its freight revenue exceeded the freight revenue of eight of the railroads ruled to be more than interurban (Ex. 36-A, R. 437; Ex. 37-A, R. 439).

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1 The petitioner and appellant will be known as North Shore.
Shields v. Utah Idaho Central Railroad Company, 305 U. S. 177, 83 L. ed. 111, as the Utah Railroad.
Texas Electric Railway Company v. Eastus, 308 U. S. 511, 84 L. ed. 437, as the Texas Railroad.

2 Utah Idaho Central Railroad Company, 214 I. C. C. 707, 305 U. S. 177, 83 L. ed. 111;
Texas Electric Railway, 208 I. C. C. 193, 25 Fed. Supp. 825, 308 U. S. 511, 84 L. ed. 437;
Chicago, South Shore and South Bend Railroad, 214 I. C. C. 167, 109 Fed. (2d S.) 419;
Piedmont and Northern Railway Company, 211 I. C. C. 4, 286 U. S. 299, 76 L. ed. 1115;
Sacramento Northern Railway, 208 I. C. C. 203;
Waterloo, Cedar Falls and Northern Railway, 208 I. C. C. 211;
Fort Dodge, Des Moines & Southern Railroad Company, 211 I. C. C. 9;
Des Moines & Central Iowa Railroad, 214 I. C. C. 353;
Salt Lake and Utah Railroad Company, 214 I. C. C. 717;
Pacific Electric Railway Company, 215 I. C. C. 414;
Oklahoma Railway Company, 218 I. C. C. 123.

Its freight revenue was approximately twice or more than six of the eleven roads so ruled (Ex. 36-A, R. 437; Ex. 37-A, R. 439).

Its freight revenue per mile of road operated was greater than nine of the eleven roads that were ruled to be more than interurbans (Ex. 36-A, R. 437; Ex. 38-A, R. 441).

In the year 1936 its freight revenue exceeded the freight revenue of the Spokane International Railway Company, a Class 1 steam railway in the northwestern region (Ex. 39-A, R. 443).

As of the year 1937, the density of the freight traffic on its lines exceeded that on the lines of four of the twenty-five Class 1 steam railways of the northwest region (Ex. 39-A, R. 443).

Of the total carload freight handled by it in 1937, 99.1 per cent by tonnage was interchanged (Ex. 17-A, R. 414). This exceeds the percentage of freight interchanged by the Texas Electric Railway, which reported the greatest percentage of freight interchanged by any of the eleven comparable electric railways ruled to be more than interurbans (Ex. 18-A, R. 416).

Of the 36,014 cars of carload freight carried by it in 1937, 35,263 cars were interchanged, and of these 24,426 cars were received from steam railroads and transferred to steam railroads (Ex. 19-A, R. 417); 93.4 per cent of its total freight was handled in common with the steam railways, of which 99.4 per cent was carried in foreign equipment. Of this, 91 per cent moved in interstate commerce.

It excelled by far all other electric railways considered in connection with this exemption proviso. None of the electric railways ruled to be more than interurbans carried as great a percentage of freight in interstate commerce as

did the North Shore (Ex. 22-A, R. 421). In 1937 it carried between 96 and 97 per cent of its freight in standard equipment, and in that respect it excelled the other eleven roads.

The percentage of freight which was carload had increased 54 per cent in the proportion of freight handled in carload lots between 1930 and 1937. (See Exs. 51-A to 58-A, inclusive, R. 479-493; see Ex. 17-A, R. 414.)

In 1937 it earned $5,881.00 from freight revenue per mile of road operated, which was in excess of $221.00 over that of 1936 (Ex. 34-A, R. 435), and was in excess of $977.00 more than the eleven comparable electric railways ruled to be more than interurbans, for the year ending December 31, 1936 (Ex. 36-A, R. 437).

It exceeds the freight revenue of all but three of the eleven railroads listed (Ex. 37-A, R. 439).

NORTH SHORE—"The total revenue derived from the freight service to the total transportation service was approximately 23 per cent" (R. 493).

TEXAS RAILROAD—"That the revenues derived from the transportation of freight are exactly 20 per cent of the total transportation revenue of the carrier for the five-year period, and that the passenger revenue is more than three times the freight revenue" (Brief in Supreme Court, 18, 61, 62).

It exceeds by 100 per cent or more the total freight revenue of six such roads. The freight revenue per mile of road operated exceeded the corresponding ratio on all but two of the eleven railways (Ex. 36-A, R. 437; Ex. 37-A, R. 439; Ex. 38-A, R. 441).

The increase was not due only to the hauling of coal to a single consignee. It handled various products, depending upon the season and locality (Ex. 44-A, R. 450).

In 1925 the North Shore carried 536,095 tons of freight. In 1937 the North Shore carried 1,790,437 tons (Ex. 40-A, R. 445; Ex. 41-A, R. 446).

It measures up fully to the standard set up in the Texas Electric Railway case, to wit:

> (a) That an electric railway which is engaged in the general transportation of freight whether the revenue therefrom is greater or less than its passenger revenue. The total revenue from transportation of freight, express and mail of the Texas Electric in 1933 was $338,853, while in 1937 the combined freight and express of the North Shore was $856,276 (Ex. 58-A, R. 493);
>
> (b) Which handles the bulk of such freight in standard equipment similarly used by steam railroads;
>
> (c) Which freely interchanges the same with steam railways for transportation to and from points on their lines;
>
> (d) Which has a considerable portion thereof handled in interstate or foreign commerce;
>
> (e) Which participates in standard rates with the steam railroads for interstate transportation.

It handles freight in carload and less-than-carload lots; the bulk is in carload shipments in much the same manner as on the steam railways. It offers all the protective service for shipments of perishable goods available on the steam railroad systems. It performs switching services for industries situated along its tracks. It has reciprocal switching arrangements with steam railways. Its freight is of diverse character. In a single day's business commodities handled in carload lots may vary from cabbage to tractors (Ex. 17-A, R. 414; Exs. 51-A to 58-A, R. 479-493, 703, incl.; Ex. 44-A, R. 450).

In 1937 it earned $811,522, while the Sacramento North-

ern Railway earned but $722,420, and it was held that in revenue it was more extensive than those of true interurbans.

In 1936 its freight revenue exceeded that of the Spokane-International Railway, a Class 1 steam railway of the northwestern region, and in 1936 the density of its freight traffic exceeded that on the lines of four of the twenty-five Class 1 steam railways of the northwestern region (Ex. 36-A, R. 437; Ex. 38-A, R. 441; Ex. 39-A, R. 443).

In 1937 it handled 1,709,914 tons of freight; 93.5 per cent was handled in carload lots in standard equipment. Approximately 50 per cent is ferry truck service, which is carried on standard steam railroad flat cars. Ferry truck service by trucks owned by it was discontinued on April 15, 1937, yet that type of service has been on the increase because it is done on ferry trucks of private contractors (Ex. 17-A, R. 414; Ex. 19-A, R. 417).

It interchanges freight with four railroads at six points and through one of these it has connections with all the steam railroads serving the Chicago area.[1]

Exhibit 23-A (not included in transcript)* shows that a single train revealed equipment belonging to twenty-eight steam railroads and transportation companies.

It exceeded all other eleven electric railways in percent-

1 (a) With the C. M. & St. P. R. R. at three points:
1. Within the corporate limits of the City of Racine, Wisconsin;
2. Within the corporate limits of the City of Chicago, Illinois, at Buena Park;
3. At Rondout, Illinois.

(b) With the C. & N. W. R. R.:
1. At Great Lakes, Illinois;
2. At Oakton street in the City of Niles Center, Illinois.

(c) With the Soo Line:
1. Within the corporate limits of Mundelein, Illinois;
2. Rondout, Illinois, throughout the Belt line, to wit: the Elgin, Joliet and Eastern Railroad with all the railroads operating into the Chicago area.

*Not included in transcript signifies that it is part of the record but, by stipulation (R. 569), not printed.

age of the freight in interstate commerce. Exhibit 21-A (R. 419) shows that in a two weeks period it handled carload shipments originating in twenty-seven states from the Atlantic Coast to the Pacific Coast and from the Gulf Coast to the Canadian border. Some of these shipments terminated in Canada.

As an initial carrier it participated in 365 tariffs, and as delivery and/or intermediate carrier 954 tariffs. It maintains freight solicitors at points as far west as Portland, Oregon, and as far east as Washington, D. C. (Ex. 22-A, R. 421; Ex. 21-A, R. 419; Ex. 24-A, R. 422, also R. 130).

The North Shore has approximately the same amount of way switching tracks in relation to miles of road owned as the Class 1 steam railways of the United States, and is slightly better equipped in this respect than the Class 1 steam railways of the western district (Ex. 13-A, R. 411).

Its freight classification yards at Pettibone, Great Lakes, has a capacity of 202 freight cars. Its right of way north of North Chicago Junction to Milwaukee is 100 feet wide, and south to Howard street, Chicago, is more than fifty feet wide and ample for the location of switching tracks for the use of industries situated along its lines [Ex. 70-A, R. 515; Ex. 45-A, p. 4, Sec. 2 (h), Not in T.].

Its schedule of tariffs enables it to participate in the movement of freight to all parts of the country. Its facilities are so complete that in 1937 it was able to handle 24,416 cars of carload freight in intermediate or bridge service, in direct competition with the steam railroads (Ex. 19-A, R. 417).

It was held that interurbans are built largely upon streets and public highways. The North Shore operates from Howard street, Chicago, to Harrison street, Milwaukee, via the Skokie Valley Line, over its own private right

of way over the entire route [Ex. 45-A, p. 4, Sec. 2 (f), Not in T.].

The Shore Line division is not used for through trains, except for one train daily. It operates in city streets in common with vehicular traffic for only 2.6 miles of route. The right of way on less than 3 per cent of the owned miles of route is not owned by the North Shore. The percentage of miles of route owned is higher than that of nine of the eleven comparable electric railways ruled to be more than interurbans (Ex. 9-A, R. 405).

Its grade crossings are protected by a modern system of devices.[1]

In addition, the majority of the numerous railroad crossings protected by gates are jointly owned and maintained by various railroads with the North Shore but operated by North Shore men (Ex. 25-A, Not in T.).

It maintains interlocking towers on an expense-sharing basis with steam railroads. It repairs the equipment of foreign lines, when necessary; has filed tariffs in which it participates in the movement of freight with the steam railroads of this country, and through its membership in various freight associations it has co-operated with the steam railroads in the development of regulation of the general transportation system (Ex. 24-A, R. 422; R. 157, 164).

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1 Four with Northwestern:
(a) South Milwaukee, Wisconsin;
(b) Kenosha, Wisconsin;
(c) Lake Bluff, Illinois;
(d) Skokie Valley, Illinois.

One with Chicago, Milwaukee & St. Paul:
(a) Racine, Wisconsin.

All of the above jointly owned and maintained, but operated by North Shore men exclusively.

One with Rapid Transit:
(a) At Niles Center, Illinois, owned and operated by North Shore.

The right of way is fenced for almost the entire distance, which permits a speed of fifty-five miles per hour, including stops. Surely that is not interurban (Ex. 14-A, Not in T.). IT IS NOT EXCEEDED BY STEAM LINE PASSENGER TRAINS.

It is said that the passenger operations of an interurban differ from those of a street or suburban railway mainly in extent of its lines, and it has been held in that same case that "if the line extends from city to city it is termed an interurban, although handling the same traffic and being operated in substantially the same manner as a street or suburban line."

The local transportation of passengers was only 4.6 per cent of the total revenue derived from street car service. It operates under conditions which make the average speed of this road fifty-five miles an hour, including stops between Chicago and Milwaukee, possible. Street and suburban railways rarely operate trains in excess of one or two coaches, or at such high speed. The North Shore operates as high as eight. It owns modern terminal facilities similar to that on steam railways (R. 244-247).

It sells through railroad and Pullman tickets to any place in the United States, Canada or Mexico and provides all the service, including baggage, as steam railroads. The North Shore has every feature of a steam railroad and not of street, suburban and interurban railways, including full dining car service. Its trains are operated under standard steam railroad rules (Ex. 28-A, R. 424).

In 1937, 37.5 per cent of the passenger revenue earned was from interstate traffic. The highest interstate passenger revenue reported by any of the eleven comparable electric railways was less than 3 per cent (Ex. 26-A, R. 422; Ex. 27-A, R. 423).

Only three of the eleven railroads earned more revenue from freight operations than does the North Shore[1] (Ex. 36-A, R. 437).

Mere deviations from standard steam railroad operations do not constitute interurban operation.[2]

The ballast on the Skokie Valley Line of respondent was of heavier construction than that of the Chicago & North Western Railway (R. 216, 242, 276).

Texas Railroad, 208 I. C. C. 193, 25 Fed. Supp. 825, standard freight cars could not be set at some of the stations because of insufficient clearance, and the freight trains could not be moved over tracks used by passenger cars through the City of Dallas, and that such trains moving from or through Denison had to be switched over the tracks of steam railroads in Dallas, and the freight trains were operated principally at night because of city franchise restrictions, and yet it was held more than an interurban.

In Utah Railroad, even though the bridges on the carrier's lines were not strong enough for steam locomotives or the heaviest coal cars in use on eastern lines, and the franchise restrictions limited the length of train to three cars in Provo, it was held more than an interurban.

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1 It has been held that freight revenue in excess of 50 per cent of total revenue from transportation is not a necessary condition for exclusion from the exemption proviso. It has been maintained that the freight operations of an electric railway may exceed those of a true interurban, even though the passenger revenues exceed the freight revenue.

Again we call attention to what has been said by the Commission in the Texas Electric Railway case, that an electric railway is not an interurban, "if it is engaged in the general transportation of freight, whether the revenue therefrom is greater or less than its passenger revenue."

2 The Chicago Tunnel Company, 214 I. C. C. 81, operated 80 per cent of its route miles on public streets.

Sacramento Northern Railway, 208 I. C. C. 203, the movement of freight on city streets was restricted to certain hours and the number of cars per train limited by franchise and the curves on some points too sharp for steam locomotives.

The bridges of the North Shore are admitted sufficient to support an average steam railroad train (Ex. 45-A, Not in T.). Its power is sufficient for sixty-five loaded cars.

Its employees who work on the intercity lines are distinct from those operating the local service.

It reported five off-line freight solicitors.

It participated in 1,319 tariffs. (Compare with Oklahoma Railway.)

The steepest grades on the line of the North Shore are less than those on the Pacific Electric, 215 I. C. C. 414, the Oklahoma Railway, 218 I. C. C. 123, and the Waterloo Railway, 208 I. C. C. 211, which reported grades of 8.2 per cent, 8 per cent and 6 per cent, respectively. Four of the eleven comparable electric railways reported curves of fifty feet and less in radius. The weight of rail of the North Shore is 88 pounds per yard, in general heavier than the Oklahoma, supra; Pacific, supra; Texas, supra, and Waterloo, supra, railways, and the Salt Lake & Utah Railroad Company, 214 I. C. C. 717, had rail running as low as 40 pounds.

What deviation there is, if any, between the North Shore and steam railways is of negligible, minor consideration. An unusual operating condition now and then on the lines of the carrier does not prevent it from doing an extensive freight business, and cannot be considered against it. The lines, equipment and operating conditions of the North Shore differ less in general from those of the steam railroads than in the case of the eleven electric railways.

The North Shore is a member of several freight carrier associations; freight revenue is collected according to the rules laid down for the steam railroads; it repairs foreign freight equipment on its own lines, as required, and its

reports are made out in accordance with the regulations prescribed by the American Railroad Association. It makes its payments and collections of per diem charges according to the procedure of the steam railroads. Its freight business is conducted on standard time. Its various passenger and freight services are in the same manner, including help in planning travel tours. Its trains are run under orders similar to those of the steam railroads, and a considerable portion of the road is protected by the most modern block signal system (R. 216, 226, 227, 228, 234, 247, 248, 253).

It is claimed that freight received from the Chicago Rapid Transit Company at Niles Center cannot be handled without the use of gauntlet tracks so that the cars may clear passenger platforms. Gauntlet tracks are common to almost every steam railroad in America. There are only about six spots where gauntlet tracks are used, and that is on a four-mile stretch between Howard street and Niles Center.

The record discloses it does not interfere with the regular passenger tracks. Standard freight equipment of all steam railroads pass over those tracks without restrictions.

About four miles of track between Buena Park and Howard street in Chicago are leased by the North Shore from the Chicago, Milwaukee, St. Paul and Pacific Railroad, and the North Shore sublets that portion to the Chicago Rapid Transit Company, although it is used exclusively by the North Shore.

The reason for the sublet is due to jurisdictional differences between the intervening respondent's labor organization and another local union, 241.

While all freight from the north (Milwaukee) is handled

by the men of the North Shore to Buena Park, all freight from Buena Park north to Howard street only is handled by the employees of the Chicago Rapid Transit Company, and beyond that by the North Shore men.

It was held in Piedmont Northern Railway, 298 U. S. 311, that that railroad, "* * * competes with steam trunk lines in such manner, that in view of the declared policy of the act we cannot hold it an 'interurban' railway within the exemption of the same paragraph."

Applying that principle to the North Shore—it competes with steam trunk lines carrying passengers between Chicago and Milwaukee; handles 60 per cent of its carload freight in bridge service between railways; competes with the steam railroads, and its employees perform substantially the same services as by employees of steam railways.

The North Shore exceeded the trackage of nine of the eleven railways. Its units of equipment were substantially in excess of that of ten of the eleven electric railways (Ex. 31-A, R. 430). If we exclude the Pacific Electric from the average, the North Shore operated two and a half times as many units of equipment as did the remaining ten electric railways (Ex. 31-A, R. 430).

The North Shore was held to be more than an interurban under the Locomotive Inspection Act. That decision was reached on the basis of miles of track operated; amount of freight and passenger equipment; track connections with steam railroads; facilities for interchange of freight with such roads; number of railroads with which it had joint tariffs and through rates; the number of carloads received from the connecting railroads; passenger and freight revenue; per cent of right of way which was privately owned; that this road transported express and baggage, and that it performed switching services along its lines.

Of all the railroads ruled to be more than interurbans only three interchanged more carloads of freight than did the North Shore; only three carried more freight than the North Shore. Twenty-two roads operated a greater percentage of their lines over public streets and highways; only five had more freight cars, and twenty-eight had less units of equipment than the North Shore. Eight of the thirty-four roads ruled to be not exempt reported more locomotives than the North Shore had then, but only four reported more locomotives than the North Shore has now. Since 1935 the North Shore has increased the number of miles of track, added two steam locomotives, and has increased the percentage of right of way which it owned. Between 1925 and 1937 it increased the tons of freight moved by 218.9 per cent, whereas the number of passengers carried has fallen off by 27.1 per cent (Ex. 31-A, R. 430; Ex. 69-A, Not in T.; Ex. 41-A, R. 445).

For direct comparison with the Utah and Texas Railroads held to be more than interurbans, we call attention to charts I and II. (See appendix.) We also call attention to:

COMPARATIVE DEVELOPMENT AND SERVICE.

North Shore—A distributor of merchandise for and to all parts of the United States in large industrial districts and adjacent farming territory.

Utah Railroad—To develop and serve two valleys in Northern Utah and encourage the production of sugar beets; industrial development fostered by collecting raw products from the fields and delivering them to the processing plants located on its line, and delivering to those plants the necessary materials for such processing from outside of the territory served.

Texas Railroad—Originally constructed for passenger and express service only. Incorporated as an interurban in

1916. Freight handled since 1928, due to loss of passenger service. Mostly intrastate commerce. Fifteen industries located adjacent to its tracks. Intrastate shipments average about double interstate shipments. The interline shipments move from or through the country. It is an intermediate carrier of service on through routes, but the traffic moving on these routes has not been large so far.

COMPARATIVE GRADES AND RAILS SUITABLE TO STEAM RAILROAD TRAINS.

North Shore—Suitable.

Utah Railroad—Not suitable.

Texas Railroad—Not suitable in various parts.

COMPARATIVE INTERLINE SERVICE.

North Shore—Complete interline service in all things.

Utah Railroad—Hauls sugar beets to the plants and their output to steam railway lines.

Texas Railroad—The bulk of its freight in interline service.

COMPARATIVE CLASS OF PASSENGER TRAFFIC.

North Shore—Interline passengers through Chicago and Milwaukee.

Utah Railroad—Main passenger traffic transportation of students to and from two high schools.

Texas Railroad—Intrastate, no interline tickets sold to or from points on the steam railroads.

COMPARATIVE ABILITY TO OPERATE AS A STEAM RAILROAD.

North Shore—Can be operated as such.

Utah Railroad—Cannot be operated as such. Reconstruction of its road would prohibit it to continue in existence.

Texas Railroad—(a) Standard freight cars could not be put at some stations for lack of sufficient clearance;

(b) Freight trains could not be moved over tracks used by passenger cars through Dallas;

(c) City franchise restrictions in Dallas prohibited freight trains other than at night.

The Examiner and the Interstate Commerce Commission found the facts in favor of the North Shore. The District Court in its review of the Commission's findings of fact sustained it, and the Circuit Court of Appeals sustained the findings of the District Court.

B.

THE COMMISSION HAD POWER TO REOPEN THE PROCEEDINGS HERETOFORE DECIDED BY IT AND REVERSE ITS EARLIER DECISION.

The Circuit Court of Appeals held:[3]

> "In rendering its decision, the Commission stated, 'Undoubtedly this is a close or border-line case, but considering the view expressed by the Supreme Court in the case hereinbefore cited, together with the absence of any opposition of record to the contention that this carrier is exempt, and the fact that *no carload freight is handled to or from or interchanged at either of the two principal terminals,* which are much the largest cities served, the doubt must be resolved in favor of holding that the carrier falls within

[3] United States v. Chicago, North Shore and M. R. Co., 288 U. S. 1, decided January 9, 1933 (p. 2 opinion, R. 575, following transcript).

the exemption.' (The matter in italics was shown upon the subsequent hearing not to be true.)"

The only issue there was the financial structure of the North Shore. Over sixty million dollars of securities, of which thirty-nine million dollars of face value was outstanding in the hands of the public, issued with the approval of the State Commissions of Illinois and Wisconsin, but without authority of this Commission, on the theory that the carrier was exempt therefrom as an interurban. For ten years the Commission had knowledge thereof, but filed no objection for the reason that if the North Shore were held not exempt all of said securities outstanding in the hands of the public would be void and would bring ruin to innocent investors. Neither the intervening respondent nor any employe of the Receiver in any way participated in that case. Their interest was in nowise affected.

Railway Labor Act Docket No. 7 was instituted at the request of the National Mediation Board and was reopened on the Commission's own order.[1]

The Receiver filed no exception to the order.[2] Oral argument is no substitute for exceptions:[3]

"The Interstate Commerce Commission is an administrative body and is not to be hampered in its proceedings by the hard and fast rule as to pleading and practice which prevail in courts of law."[4]

"The Commission, like a court, may, upon its own motion or upon requests, correct any order still under

1 (R. 273)

2 The Interstate Commerce Commission, Rule XIV (d) 6, provides as follows:

"(Examiner's Statement as Basis for Commission's Report.) In the absence of exceptions that are sustained or of ascertained error, the statement of the issues and of the facts by the examiner will ordinarily be taken by the Commission as the basis of its report."

3 N. 1913, Inters. Com. Acts Ann., p. 1817.

4 Pennsylvania R. Co. v. United States, 288 F. 88-90.

its control without notice to a party who cannot possibly suffer by the modification made."[5]

The order was an exercise of discretion, circumscribed with due care, and no abuse of power is asserted:

> "Wisdom of reposing in Interstate Commerce Commission power to reopen cases without regard to when final order in cases was entered was matter for Congress, and not Courts, to determine."[6]

> "After a decision, order, or requirement has been made by the commission **in any proceeding** any party thereto **may** at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear." (Emphasis ours.)[7]

The status is a continuous one. That is a distinction between administrative and judicial law. An administrative body has continuous supervision over those who are before it, while courts, except courts of equity in certain cases, seek to make final adjudication. It would appear that an order, which, upon rehearing, presents a situation quite different from that which formerly appeared, should be deemed, like a rate order, not res judicata. That the Commission at one time decided one way is no legal bar to a different decision by it at another time.[8]

At the hearing of Railway Labor Act Docket No. 7 no evidence was introduced on behalf of intervener-respondent or any employee. Those participating were abetting the Receiver, without opposition or exceptions. It was virtually a friendly case by default. The record in the instant case presents an entirely different situation. In the de-

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5 Louisville & Nashville Railroad Company v. Sloss-Sheffield Steel & Iron Company, 269 U. S. 217.

6 Froeber-Norfleet, Inc., v. Southern Ry. Co., 9 F. Supp. 409.

7 Title 49, U. S. C. A. §16a; Baldwin v. Scott County Milling Co., 307 U. S. 478, 83 L. ed. 1409.

8 Tagg Bros. & Moorhead v. United States, 280 U. S. 443, 74 L. ed. 524-537.

fault hearing the Skokie Line was completely subordinated, while in the present contested hearing it was proven conclusively that the Skokie Valley Line, with the rest of its system, gave the North Shore all the characteristics of a railroad. The contest by Division 900, etc., now an intervener-respondent, and other labor organizations brought out affirmative, substantial and sustaining proof that the North Shore was out of the proviso. The first decision was by a division of the Commission, while the case under consideration was decided by the entire Commission. Four separate tribunals (the Examiner, the Interstate Commerce Commission, the District Court and the Circuit Court of Appeals) each found that the evidence sustains that the North Shore does not fall within the exemption proviso.

CONCLUSION.

We have presented this brief much in the form of a summary supplement to that of the Government's. The findings of fact are easily sustained. There are no questions of law involved which this Court has not heretofore disposed adversely to the petitioner, no conflict of decisions, and no issue of general public importance. We believe, therefore, the petition for certiorari should be denied.

Respectfully submitted,

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Division 900 of the Amalgamated
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September 26, 1941.

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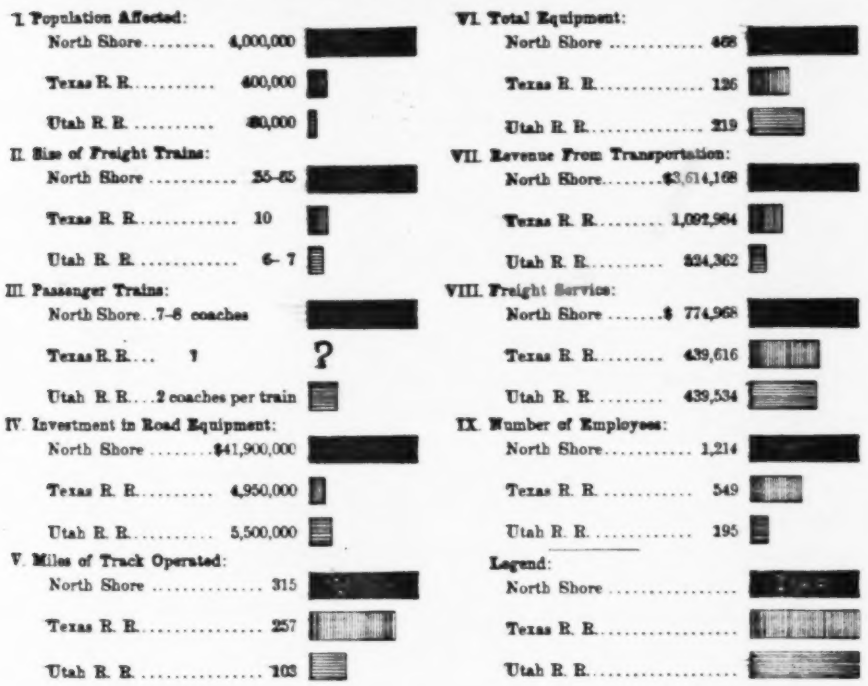
APPENDIX (CHART I).

Chicago North Shore and Milwaukee Railroad Company Compared With Texas Railroad and Utah Railroad Ruled Not to Be Within the Exemption Proviso of the First Paragraph of Section One of the Railway Labor Act as of the Year Ended December 31, 1936.



APPENDIX (CHART II).

The Chicago North Shore and Milwaukee Railroad Company Compared With Eleven Electric Railways Ruled to Be Not Within the Exemption Proviso of the First Paragraph of Section One of the Railway Labor Act as of or for Year Ended December 31, 1936.